IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.06.2005

Coram:

THE HONOURABLE MR.MARKANDEY KATJU, THE CHIEF JUSTICE
and
THE HONOURABLE MR.JUSTICE F.M.IBRAHIM KALIFULLA

Tax Case (Appeal) No.7 of 2003

The Assistant Commissioner of Income Tax
Coimbatore … Appellant

vs.

M/s.Raka Food Products,
Sholayar … Respondent

Appeal filed under Section 260-A of the Income-Tax Act against the order of the Income Tax Appellate Tribunal, Madras "B" Bench, dt. 12.9.02 in 97A No.1646/Mds/92 Assesment year 1989-90 against the order in 97 Appeal 1050/c/91-92 dt 23.4.92 on the file of the Commissioner of I.T (Appeal) Coimbatore, preferred against the Order in PAN 49-512-FN-9844 dt 27.1.92 on the file of the Assistant Commissioner of I.T, Circle I (1) Coimbatore.

For Appellant … Mr.T.Ravikumar
for Standing Counsel for
Income-Tax Department

For Respondent … Mr.P.P.S.Janardhana Raja

J U D G M E N T

THE HONOURABLE THE CHIEF JUSTICE

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This Income-Tax Appeal has been filed by the Commissioner of Income Tax, Coimbatore against the impugned order of the Income Tax Appellate Tribunal, Madras 'B' Bench dated 12.09.2002.

2. The substantial questions of law raised in this appeal are as follows:-

(i) Whether in the facts and circumstances of the case, the Tribunal was right in upholding the CIT(A) order that the sale of factory along with machineries, furniture shall be

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treated as long term capital gains in spite of the fact that depreciation had been claimed on the building, machinery and furniture?

(ii) Whether in the facts and circumstances of the case proviso to Section 50 of the Act would be applicable in respect of depreciable assets sold along with non-depreciable assets sold in a single transaction of sale?

3. We have heard the learned counsel for the parties.

4. The substantial question of law raised by the revenue relates to the direction of the CIT (Appeals) that the profit on sale of a bakery has to be assessed as long term capital gains, thereby granting exemption under Section 54-E of the Income Tax Act (in short ' the Act')

5. The facts of the case are that the assessee had filed returns for assessment year 1989-90 offering taxable income of Rs.2,44,772/-. Subsequently, it filed a revised return offering taxable income of Rs.1,20,394/-. The Assessing Officer issued notice to the assessee and made regular assessment fixing the taxable income at Rs.13,64,130/-. Against that order, the assessee filed an appeal before CIT (Appeals), who partly allowed the appeal, against which both the Revenue and the Department filed appeals before the Tribunal. Both the appeals were dismissed by the Tribunal, and against that order, the Department has filed this appeal under Section 260-A of the Act.

6. The Assessing Officer had found that the assessee had sold his bakery including the land, building and machinery for a total cost of Rs.25,50,555/-. In the original return, the assessee claimed that the gains arising out of the sale of the land were long term capital gains which showed at Rs.5,58,917/-, and gains arising out of sale of building, machinery and furniture as short term capital gain which showed at Rs.10,13,056/-. However, thereafter, he filed revised returns claiming deduction under Section 48(2) of the Act from the sale of building and then showed a long term capital loss from plant and machinery. The Assessing Officer held that the working disclosed by the assessee was wrong in view of the amendment to Section 50 of the Act wherein computation of capital gains on depreciable assets is different from those of non-depreciable assets. The Assessing Officer held that the sale effected by the assessee was of a single unit consisting of depreciable assets, and hence the entire gains arising therefrom were short term capital gains.

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7. Before the CIT (Appeals), it was submitted by the Department that the sale is supported by two separate documents and separate values have been assigned for transfer of movable and immovable assets, and liabilities have not been taken over, and therefore, it was to be considered as a case of sale of individual items of assets, movable and immovables being sold separately. Hence it was alleged that exemption under Section 54-E of the Act cannot be allowed in respect of the sale consideration attributable to depreciable assets. However the CIT (Appeals) held that that it was not a case of transfer of series of assets individually, but a transfer of the entire business undertaking as a whole and hence, it could be regarded as a long term capital asset, and the assessee should be allowed proportionate exemption from capital gains under Section 54-E of the Act and deductions under Section 48(2) should be allowed after considering the exemption under various provisions contained in Sections 53 to 54G of the Act.

8. In further appeal the Tribunal held (in paragraph 5 of its order) that the sale in question was not as a running business, and hence the sale attracted capital gains. However, the Tribunal was of the view that the findings of the CIT (Appeals) were well reasoned and required no interference.

9. It may be noted that the CIT (Appeals) in paragraph 12 of his order has observed: -

> " It is not a case of transfer of series of assets individually but a transfer of the entire business undertaking as a whole."

10. The Tribunal has not interfered or set aside the aforesaid finding of the CIT (Appeals). All that the Tribunal has observed in its order (in paragraph 5) was that "the sale in question was not as a running business". Thus, all that the Tribunal has held was that the business relating to the capital asset in question i.e., the "bakery" was not running when it was sold, but was closed. The CIT (Appeals) has clearly held that it was the entire concern which was sold. No doubt the sale was done through two separate documents in respect of movable and immovable assets, but evidently this was done only because immovable property can only be sold through a registered sale deed.

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11. In paragraph 12 of his order, the CIT (Appeals) has observed: -

> " In any event in the instant case the letter of understanding between the appellant and the buyer shows that the intention was to sell the entire bakery business with land, building, plant and machinery and the closing stock as a going concern for a total and lump

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consideration of Rs.25,55,555/-. Though the immovables had to be registered and for that purpose the guideline valuation had been adopted by the Registrar it is not a case of transfer of series of assets individually, but a transfer of the entire business undertaking as a whole. In such an event, it is not possible to determine at what consideration individual assets movable or immovable were transferred. The same is true of depreciable and non-depreciable assets also."

12. The aforesaid finding of the CIT (Appeals) in paragraph 12 of his order has not been set aside by the Tribunal. All that the Tribunal has held was that the business of the bakery was closed when it was sold. Hence it cannot be said that the Tribunal has reversed the finding of the CIT (Appeals) who held that it was a transfer of the entire business undertaking as a whole.

13. Land is not a depreciable asset. Section 50 of the Act deals only with transfer of depreciable asset. Once the land forms part of the assets of the undertaking, and the transfer is of the entire undertaking as a whole, it is not possible to bifurcate the sale consideration to a particular asset. As already observed above, Section 50 of the Act only applies only when depreciable assets alone are transferred.

14. The decision of this Court in M.Raghavan v. Assistant Commissioner of Income Tax (266 ITR 145) relied on by the learned counsel for the department is clearly distinguishable because that was a case where the asset in question was a depreciable asset. In the present case it has been found that the whole undertaking was transferred including land which is not a depreciable asset.

15. For the same reason the other decisions relied on by the revenue namely., Kali Aerated Water Works v. Commissioner of Income Tax (242 ITR 79) and Commonwealth Trust Ltd. v. Commissioner of Income Tax (228 ITR 1) are also distinguishable.

16. In view of the above, we do not find any force in this appeal and it is accordingly dismissed.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

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Copy to:

1. The Assistant Registrar,
Income Tax Appellate Tribunal,
Rajaji Bhavan,Besant Nagar, Chennai-90.

2. The Commissioner of Income-Tax
Coimbatore.

3. The Assistant Commissioner of Income Tax
Coimbatore

The Assistant Commissioner of I.T circle I (I)
Coimbatore.

+1 cc to Mr.K.subramaniam,
Sr.Standing Counsel for I.T, SR.No.25240.

SKU (CO)
DCP/28.6.2005

Judgment inTax Case (Appeal)
No.7/2003

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